Flav-O-Rich, Inc. and Finley's, Inc. d/b/a The Job Shop, joint employers *and* Gary Smith. Case 9–CA–28519

October 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 16, 1992, Administrative Law Judge Donald R. Holley issued the attached decision. The General Counsel filed exceptions and a supporting brief. Respondent Finley's, Inc. d/b/a The Job Shop (Respondent Job Shop) filed limited cross-exceptions, a supporting brief, and a response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Flav-O-Rich, Inc., London, Kentucky, and Finley's, Inc. d/b/a The Job Shop, London, Kentucky, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Respondent Job Shop has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Linda B. Finch, Esq., for the General Counsel.
Mark A. Smedal, Esq. (Alagia, Day, Marshall, Mintmire & Chauvin), of Louisville, Kentucky, for Respondent Flav-O-Rich.
Timothy R. Coleman, Esq. (Jackson & Kelly), of Lexington, Kentucky, for Respondent The Job Shop.
Sherry Brashear, Esq., of Harlan, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. Upon an original charge filed in the captioned case by Gary Smith, an individual, on May 3, 1991, the Acting Regional Director for Region 9 of the National Labor Relations Board issued a complaint on June 17, 1991, which alleged, as amended, that Flav-O-Rich, Inc. (Respondent Flav-O-Rich) and Finley's Inc., d/b/a The Job Shop (Respondent Job Shop) are joint employers and they violated Section 8(a)(1) and (3) of the National Labor Relations Act on December 19, 1990,[1] by terminating Smith's employment at Respondent Flav-O-Rich, because he engaged in union activity, and by threatening to refuse him referral to available employment if he engaged in union activity in the future. Respondents filed timely answer denying that they were joint employers and denying that they had engaged in any unfair labor practices.

The case was heard in London, Kentucky, on November 20, 1991. All parties appeared and were afforded full opportunity to participate.

On the entire record, including consideration of posthearing briefs filed by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Flav-O-Rich, a corporation, is engaged in the processing, bottling, and sale of milk and related products at London, Kentucky. During the 12-month period preceding issuance of the complaint, it purchased and received at its London, Kentucky facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Kentucky. Upon these admitted facts, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent Job Shop, a corporation, is engaged in the operation of an employment service in London, Kentucky. During the 12-month period preceding issuance of complaint, it provided services valued in excess of $50,000 for other nonretail enterprises within the State of Kentucky, including Respondent Flav-O-Rich, each of which, in turn, meet the Board's standards for assertion of jurisdiction over nonretail enterprises. Upon these admitted facts, I find that Respondent Job Shop is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that Teamsters Local 783, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent Job Shop is an entity which supplies other companies and individuals with workers. Its owner, Christine Finley, indicated that referrals fall into three basic categories. The first is one wherein a company contacts the placement agency to request that individuals be sent to them for interview for a permanent job. Qualified individuals are sent to such companies, and if one meets their requirements, he or she is hired. The company or the employee pays Respondent Job Shop a fee for the service. The second category is one wherein a temporary employee is requested. Respondent Job Shop selects an employee whom it feels can perform the

[1] All dates herein are 1990 unless otherwise indicated.

work to be accomplished and sends him or her to the company. While Respondent Job Shop determines the wages and benefits the employee will receive, the hourly rate for the employee's service is negotiated by the company and Respondent Job Shop. The company pays Respondent Job Shop the agreed-upon fee for all hours worked by the employee, and Respondent Job shop pays the employee with its check. Under this arrangement, the company is free to put the employee on its payroll after he or she has worked for 8 weeks and no further fee or payment is due to Respondent Job Shop. The third classification is one wherein a company or an individual requests that a person be referred to it for limited work. The individual referred negotiates the hourly rate with the company or individual and remits 10 percent of the amount received to Respondent Job Shop.

Gary Smith, the Charging Party, filed an application for employment with Respondent Job Shop in early 1990. He, like other applicants, thereafter participated in a one-on-one interview and appropriate testing to permit the Job Shop to ascertain his work capabilities, and he furnished references which satisfied the Job Shop.

On September 7, 1990, Roger Lewis, Respondent Flav-O-Rich's operations manager, placed an order with the Job Shop for temporary employees who could perform painting and general laborer-type work. Before placing the order, Lewis discussed the intended use of temporary employees with Timothy Howell, the chief union steward at the plant. Howell agreed temporary employees could be used as no unit employees were on layoff and they were working as much overtime as they desired. Respondent Job Shop referred Smith to fill the order.

When he was referred to Flav-O-Rich, Smith remained an employee of the Job Shop, and in return for his services he was paid the minimum wage and was entitled to the limited benefits accorded its employees by the Job Shop. The Job Shop required Smith to maintain time records which he submitted to it periodically to enable it to calculate his wages and the amount it should charge Flav-O-Rich. The record reveals that the Job Shop charged Flav-O-Rich about $2.50 per hour more than it paid Smith's for his services. As indicated, supra, after the assignment had lasted 8 weeks or more, Flav-O-Rich was free to put Smith on its payroll and no further moneys would be due to the Job Shop. If it took such action before 8 weeks had passed, the Job Shop was entitled to a referral fee.

Smith enjoyed working at Flav-O-Rich and he soon started to seek permanent employment there. The Union's business agent, Ron Abshire, testified that after Smith had been at the plant about 30 days, several employees discussed with him the advisability of requiring Smith to join the Union as the collective-bargaining agreement contained a union-security clause requiring employees to join and remain members of the Union as a condition of employment within 31 days of their hire. Abshire indicated he advised against causing Smith to join the Union at the time of the described conversation because the contract also contained a 60-day probationary period clause and thus the contract would not arguably protect Smith from termination even if he did join the Union.

It is uncontested that during the period extending from September 7 to mid-December 1990, two openings in the Flav-O-Rich cooler room were experienced. When the first opening occurred and was posted for bidding pursuant to the bargaining agreement, Smith asked Lewis if he could bid the job. Lewis informed him he could not because he was not in the bargaining unit. When the second opening occurred about a week later, the job was not posted. Smith again sought the job and he was afforded an opportunity to fill out an application for employment at Flav-O-Rich. The record suggests the job was not filled.

As Smith's temporary assignment at the Flav-O-Rich plant continued, he received his work instructions from Bob Lawson, the plant engineer. On one occasion, Lawson called Smith to his office where he informed him that Roger Lewis had observed him in the parking lot during working hours. When he was told that was unacceptable behavior, Smith claimed he was in the parking lot to give his time records to his wife so she could take them to the Job Shop. The following day, Lawson informed Smith he was to cease taking his breaks in the dairy room and was to take them, instead, in the Flav-O-Rich breakroom. Lawson credibly testified he took the action because Smith had been overstaying his breaks. Lawson recalled that he brought the excessive breaktime situation to someone's attention at the Job Shop. The next day, November 26, Lawson handed Smith a ''Speed Memo,'' which was placed in the record as General Counsel's Exhibit 4. It stated:

> Effective this date you are instructed to:
>
> Be sure to arrive at work station promptly at 8:00 AM.
>
> Take 1st break at 10:00 AM to 10:15
>
> Take Lunch at 12:00 to 12:30
>
> Take 2nd break at 2:00 PM to 2:15
>
> Breaks are to be taken in plant employee breakroom only.

Lawson credibly testified that Flav-O-Rich utilizes formal disciplinary forms rather than ''Speed Memos'' to discipline its employees for company rules infractions.

Smith testified, without contradiction, that he was laid off by Respondent Flav-O-Rich during Thanksgiving week (November 19 through 23) and that he was then informed by Lawson that he would also be laid off during the Christmas and New Year's holidays from December 24 until January 2, 1991.

Lawson testified that on Monday, December 17, Lewis told him Smith's work was winding down and that Friday would be his last day. He claimed he relayed the information to Smith. Smith denied Lawson's claim, but Timothy Howell, the Union's chief steward, credibly testified that on Monday or Tuesday, December 17 or 18, Smith told him he had been informed that the coming Friday would be his last day, and he asked him what he might do to save his job. Howell testified he discussed the situation with Abshire and they decided they might save Smith's job by having him sign a checkoff authorization as he had worked at the plant in excess of 60 days. Pursuing that plan, Howell caused Smith to sign a checkoff authorization at about 4:30 p.m. on Wednesday, December 19. Howell took the executed card to Roger Lewis' office and gave it to the operations manager. He testified that when he gave the card to Lewis that Lewis stated,

''We told him that Friday's his last day. We don't have a position for him. The job's done.''

Smith credibly testified that when he reached his home, which was about 35 miles from the Flav-O-Rich plant, on Wednesday evening, a brother and his mother both informed him they had spoken with a lady from Respondent Job Shop who had told them that this assignment at Flav-O-Rich was over and he should not report for work the following day. Lewis admitted Flav-O-Rich terminated Smith's assignment at its facility, but refrained from supplying any details.[2] Job Shop Manager Jones claims she documented on Respondent Job Shop Exhibit 1 a December 18 call from Lewis in which he informed her Smith's assignment would end December 19. As Howell, Lawson and Lewis all credibly testified that, as of December 17 or 18, the date set for the termination of Smith's' Flav-O-Rich assignment was Friday, December 21, I do not credit the described Jones' testimony, nor do I accord any weight to Respondent Job Shop Exhibit 1. The factual chronology causes me to conclude and find that Lewis called the Job Shop to terminate Smith's Flav-O-Rich assignment immediately after Howell gave Lewis Smith's executed dues checkoff authorization on Wednesday, December 19.

On Thursday, December 20, Smith arrived at the Flav-O-Rich plant at about 7:30 a.m. He discussed his situation with Claude Gilbert, the garage steward. When Lewis arrived around 8 a.m., Gilbert and Smith went to his office. Gilbert observed Smith had worked at the plant more than 60 days, and he urged Lewis to put him on the payroll. Lewis indicated that Smith worked for the Job Shop rather than for Flav-O-Rich and informed Gilbert and Smith, in any event, he had no job openings for Smith. Gilbert predicted a grievance would be filed and Lewis responded by saying, ''Whatever.''

After leaving Flav-O-Rich on December 20, Smith went to the Job Shop offices. Kathy Jones, Job Shop's general manager, was talking to someone on the phone when Smith arrived. Smith and Jones both sought to describe what was said and done in the Job Shop office that morning. Jones was quite evasive and argumentative when describing what happened. Smith's version, which is felt to be more reliable, is as follows. He testified Jones was apologizing to some male on the phone when he arrived and that when she concluded the conversation, she remarked that Roger was ''pissed off'' and she was too. He recalled that Jones told him he was not a Flav-O-Rich employee; that he worked for the Job Shop and he had no business trying to join the Union or be part of any union while he worked for the Job Shop. He testified Jones told him if he ever tried to join a union or be part of one again, he would be fired from the Job Shop and not work for anybody else in London again. At some point, Smith testified he told Jones he had just been doing what the union stewards told him he could do; that they told him he had worked his days and he could join the Union and be put to work at Flav-O-Rich. He claims the conversation ended with Jones stating she would talk to Roger again after he had cooled off.[3]

On Friday, December 21, Smith testified he went to the Flav-O-Rich plant to get Lawson to sign his time records for that week. Smith claims that during the conversation Lawson told him if he had signed a union card, he would not be coming back to Flav-O-Rich. Lawson denied that he made the comment. Noting he no longer worked for Flav-O-Rich at the time of the hearing, I credit Lawson.

On or about December 26, Smith was referred by the Job Shop to a permanent position at L & C Carpet. He worked there at a salary of $150 per week until late February or early March 1991. After Smith quit the L & C Carpet job, he was referred to a temporary job at Kerns Bakery. At some point after he had been at Kerns for over 8 weeks, he became a permanent employee. At the time of the hearing, Smith was unemployed.

The record reveals that Flav-O-Rich has utilized 40–45 temporary employees supplied by the Job Shop at various times. It has never placed a Job Shop temporary on its payroll. With specific regard to the painting and general laborer-type work performed by Smith, the record reveals Flav-O-Rich created a building and ground maintenance position in late February or early March 1991 and the incumbent of the position, who came from the bargaining unit, performed painting and laborer-type work. The record further reveals that for a period of 3 weeks in August 1991, Flav-O-Rich utilized several temporary employees supplied by the Job Shop to perform painting and laborer-type work. The record does not reveal whether Smith was available and was seeking referral by the Job Shop in August 1991.

B. *Discussion and Conclusions*

1. The joint employer contention

The complaint alleges, and General Counsel contends, that Flav-O-Rich Rich and the Job Shop constitute a joint employer. I find the contention to be without merit for the reasons set forth below.

Factors to be considered in resolving joint employer issues are found in *Laerco Transportation*, 269 NLRB 324, 325 (1984), where the Board stated:

> The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment. Whether an employer possesses sufficient indicia of control over petitioned-for-employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

The record reveals that Respondent Job Shop employs approximately 165 temporary employees and 11 permanent staff members. As indicated, supra, it obtains such employees by accepting applications, interviewing and testing applicants

[2] Lewis admitted during his testimony that Respondent Flav-O-Rich called the Job Shop to terminate Smith's assignment, but he supplied only sketchy details. Thus, after claiming that Smiths engagement in union activities had nothing to do with the decision to terminate his assignment, he stated he thought he talked to Pam at the Job Shop and ''The discussion went on that Gary was wanting to join the union over there and he didn't work for us. Was they aware that he was trying to join the union, and that he did—he wasn't employed by us, he was employed by them.''

[3] On November 20, Smith was referred to a 2-hour job at C. G. Designs.

and satisfying itself that the references they have provided are satisfactory. Job Shop's owner, Finley, indicated that, when clients contact her firm seeking temporary workers, the agency matches the abilities of available employees with the work order and seeks to refer employees to the client who can perform the work with little or no supervision. The Job Shop negotiates an hourly rate for the services it provides with the client, indicating to the client that it can dissolve their relationship without paying a referral fee by placing the temporary employee on its own payroll after the temporary has been on the assignment for at least 8 weeks. Finley testified that when temporary employees go on an assignment, they are given an employee manual and a benefit package explaining to them what they can expect, what their pay is going to be and containing instructions that they report absences, on-the-job injuries and other problems to the Job shop.

During calendar year 1990, Gary Smith was one of many temporary employees employed by the Job Shop. As revealed, *supra*, he, together with several other temporary Job Shop employees, was assigned to perform nonskilled work at Flav-O-Rich in September 1990. Smith's assignment at Flav-O-Rich lasted almost 4 months. During that period, other temporary employees were referred by the Job Shop to Flav-O-Rich, but most only remained on the assignment for short periods. The record reveals Smith was capable of performing the painting and general cleaning work he was assigned to perform and Lawson, Flav-O-Rich's plant engineer, merely informed the employee where he was to work on a given day.

While the record clearly reveals that Smith, the Job Shop, Flav-O-Rich management, and various union officials were fully aware of the fact that Smith's assignment to work at Flav-O-Rich was temporary, Counsel for the General Counsel contends, in effect, that the temporary assignment was converted to a permanent assignment as Flav-O-Rich management exercised such control over Smith during the assignment as to cause it to become a joint employer of the employee. Those controls or actions relied upon include: alleged discipline of the employee; a requirement that he maintain a Flav-O-Rich timecard; acceptance of the employee's notification that he would be absent; notification to the employee of periods of layoff; and Flav-O-Rich's termination of the employee.

As revealed *supra*, General Counsel claims that Lawson disciplined Smith when he: told him on November 24 that he had been observed in the parking lot during worktime; when he told him on November 25 that he was to take his breaks in the Flav-O-Rich breakroom rather than in the dairy area; and when he presented the employee with General Counsel's Exhibit 4, which states his starting time, his breaktimes, his lunch hour and specifies the place he was to take his breaks. In my view, Respondent Flav-O-Rich, by engaging in the above actions, was simply attempting to insure that Smith would provide the services it was paying for. One must stretch the definition of discipline to categorize the above-described actions as a form of discipline. I find that by engaging in the actions described, Respondent Flav-O-Rich did not meaningfully discipline Smith as contended by General Counsel.

With respect to the maintenance of time records, Smith testified he followed the Job Shop's instruction that he was to maintain a record of his hours worked, cause a Flav-O-Rich official to sign his document to verify its accuracy, and he was then to submit it to the Job Shop. The Job Shop thereafter used Smith's information to compute his pay and to compute the amount it charged the client. Patently, the time records Smith prepared by using Respondent Flav-O-Rich's timeclock were merely time records which were used to verify the accuracy of those kept personally by Smith. I find that by requesting that Smith engage in the above-described ''housekeeping'' chore, Respondent Flav-O-Rich did not substantially seek to control Smith's terms and conditions of employment.

Uncontradicted evidence reveals that Respondent Flav-O-Rich informed Smith, rather than Respondent Job Shop, that Smith's services were not desired during Thanksgiving week or during the Christmas holidays. Similarly, Smith testified without contradiction that when he did not report for work on two occasions during his tenure at Flav-O-Rich, he reported his absence to Lewis rather than to Job Shop personnel. Finley indicated during her testimony that matters such as those described should have been reported to the Job Shop. While General Counsel asserts that the failure by Flav-O-Rich and/or Smith to make the Job Shop aware of Smith's absences from his Flav-O-Rich assignment substantially affected the employee's terms and conditions of employment, I find the impact was minimal.

General Counsel caps her argument that Respondent Flav-O-Rich exerted such control over Smith as to warrant a conclusion that it was his joint employer by contending the record reveals that Respondent Flav-O-Rich was the entity which informed Smith that he was terminated. Actually, the record merely reveals that on Monday, before he left Flav-O-Rich on Wednesday, December 19, Lawson simply told Smith his assignment would end on Friday of that week. Smith remained an employee of Respondent Job Shop when the assignment ended. Indeed, he was referred by it to a job of short duration on the very next day, December 20, 1990.

In sum, I find that Respondent Job Shop controls the essential terms and conditions of employment of its temporary employees, including those of Gary Smith. I further find that the supervision and direction exercised by Respondent Flav-O-Rich over employee Smith was limited and routine and that it is insufficient to support a joint employer finding. See *Laerco*, supra, and *TLI, Inc*., 271 NLRB 798 (1984).

2. The alleged 8(a)(1) violation

Having credited Smith's claim that Kathy Jones told him on the morning of December 20, 1990, that ''he had no business trying to join the Union or be part of any union while he worked for the Job Shop, and if he ever tried to join or be part of a union again he would be fired from the Job Shop and not work for anybody else in London again . . . .'' I find that Respondent Job Shop, acting through Kathy Jones, threatened not to refer an employee to available jobs if he engaged in union activity. By engaging in such conduct, Respondent Job Shop violated Section 8(a)(1) of the Act, as alleged.

3. The termination issue

The complaint alleges that Respondents (as joint employers) discharged Gary Smith on December 19, 1990, because

he engaged in union activities and they thereby violated Section 8(a)(1) and (3) of the Act. The facts relating to the termination of Smith's Flav-O-Rich assignment are summarized below.

Lewis testified he told Lawson on Monday, December 17, that Smith's work was winding down and that Friday would be his last day. Lawson conveyed the information to Smith. Smith then told union steward Howell that Friday was to be his last day, and he asked Howell if the Union could help him save his job at Flav-O-Rich. Howell and Union Business Agent Abshire decided that, as Smith had worked longer than the contractual probationary period, Lewis might put him on the payroll if he was presented with a dues-checkoff authorization signed by Smith. Howell caused Smith to execute a dues-checkoff authorization at the end of the day shift on Wednesday, December 19, and he delivered it to Lewis. Lewis informed Howell that Smith was an employee of the Job Shop—that he had no job for him. Before Smith got home from work on Wednesday, December 19, someone from the Job Shop had contacted his brother and his mother leaving a message that his assignment at Flav-O-Rich was over, and he should not report for work there the next day. I have found, *supra*, that an inference that Lewis phoned the Job Shop to terminate Smith's Flav-O-Rich assignment immediately after Howell delivered the executed dues-checkoff authorization is warranted.

While the above facts reveal that Smith's Flav-O-Rich assignment was terminated by Lewis 2 days before it was scheduled to end on Friday, December 21, 1990, those facts do not establish that Smith was discharged on Wednesday, December 19, because the discharge allegation was bottomed upon a contention that Flav-O-Rich and the Job Shop constitute a joint employer, and I have found that contention to be without merit. Although General Counsel did not contend that Respondent Flav-O-Rich violated Section 8(a)(1) and (3) by causing Respondent Job Shop to terminate Smith's assignment at the Flav-O-Rich facility 2 days early because the employee engaged in union activity at Flav-O-Rich in an attempt to prolong his assignment and/or obtain permanent employment there, the circumstances surrounding Smith's exit from Flav-O-Rich were fully litigated by the parties. In my view, those facts compel a conclusion that Lewis caused the Job Shop to end Smith's Flav-O-Rich assignment on Wednesday, December 19, rather than on Friday, December 21, because Smith engaged in union activities in an attempt to avoid having his Flav-O-Rich assignment end on Friday, December 21, 1990. Having reached such a conclusion, I find that by ending Gary Smith's Flav-O-Rich assignment because the employee engaged in union activity, Respondent Flav-O-Rich violated Section 8(a)(1) of the Act. While the record reveals that an agent of Respondent Job Shop actually contacted Smith's relatives to inform them the Flav-O-Rich assignment had been terminated, it fails to affirmatively reveal that any Job Shop official was aware on Wednesday evening, December 19, 1990, that Respondent Flav-O-Rich was requesting that the assignment be terminated because Smith had engaged in union activity. In the absence of such a showing, I find that counsel for the General Counsel has failed to establish, prima facie, that Respondent Job Shop terminated either Smith's employment or his assignment at Flav-O-Rich in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent Flav-O-Rich and Respondent Job Shop are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Flav-O-Rich and Respondent Job Shop do not constitute a joint employer within the meaning of the Act.

4. By requesting that the Job Shop end Gary Smith's assignment at its facility because he engaged in union activity while assigned to such work, Respondent Flav-O-Rich violated Section 8(a)(1) of the Act.

5. By telling Gary Smith that he could not join a union while employed by it, and by telling him he would not be referred to available work or work for anyone in London, Kentucky, if he joined a union, Respondent Job Shop violated Section 8(a)(1) of the Act.

6. The Respondents have not violated the Act except as expressly found herein.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, it shall be recommended that they be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent Flav-O-Rich caused Respondent Job Shop to terminate employee Gary Smith's assignment at its plant on Wednesday, December 19, 1990, rather than on Friday, December 21, 1990, because Smith engaged in union activity, it is recommended that Respondent Flav-O-Rich be ordered to make Smith whole for the losses he sustained because of the discrimination practiced against him, less interim earnings, with interest to be computed in the manner prescribed in *New Horizons For the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

A. The Respondent, Flav-O-Rich, London, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating the assignments of temporary employees because they engage in union activities to avoid termination of their temporary assignments.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employee Gary Smith whole for losses he sustained because of the discrimination practiced against him,

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

with interest, as set forth in the remedy section of this decision.

(b) Notify Respondent Job Shop and employee Gary Smith, in writing, that Flav-O-Rich will accept Gary Smith as a temporary employee if he is referred to it in the future.

(c) Post at its facility in London, Kentucky, copies of the attached notice marked ''Appendix A.''[5] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The Respondent, Finley's Inc., d/b/a The Job Shop, London, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees by telling them they cannot join a union while employed and that they will be denied referral to available work if they join a union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in London, Kentucky, copies of the attached notice marked ''Appendix B.''[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate the assignments of temporary employees because they engage in union activities to avoid termination of their temporary assignments.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make employee Gary Smith whole for losses he sustained because of the discrimination practiced against him, with interest.

WE WILL notify Respondent Job Shop and employee Gary Smith, in writing, that

WE WILL accept Gary Smith as a temporary employee if he is referred to us in the future.

FLAV-O-RICH, INC.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees by telling them they cannot join a union while employed and that they will be denied referral to available work if they join a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

FINLEY'S INC., D/B/A THE JOB SHOP

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[6] See fn. 5.